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In the

UNITED STATES SUPREME COURT

October Term, 1940

No. 67

SUSIE WILLIAMS, ET AL.,

vs.

ALLEN TOOKE, ET AL.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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May it Please the Court:

We submit herewith a brief outline of certain reasons why in our opinion Applicants' petition for writ of certiorari should be denied in this cause.

I.

No grounds for Jurisdiction of a Federal Court were alleged in Complainants' Original Bill below.

Petitioners now appear to rely solely, for Federal jurisdiction in the District Court, on their allegation that only one Supreme Court Judge, to-wit, Judge Critz,

acted on their application for writ of error in the State Supreme Court, the other two Judges being out of town or sick; and they urge that without concurrence of at least two Supreme Court Judges, the judgment dismissing their application was void. To this contention we think there are two complete answers:

A. Texas Statutes, Article 1800a, provide that only one Supreme Court Judge may when joined by two Commissioners, dispose of applications for writs of error.

Since Petitioners' Bill nowhere alleged that Judge Critz was not joined and assisted by two Commissioners (pages 167 and 168, Tr.), it fails to allege a case of illegal or arbitrary action. The above statute has been held constitutional.

Gatz vs. *City of Kerrville*, 121 Tex. 92.

B. The uncontroverted affidavit of Judge Critz (page 165, Tr.), that application for writ of error was denied in the usual and regular channel, was available on the motion to dismiss.

Rule 12b, 28 *U. S. C. A.*, following Sec. 723c;

Alabama Independent Service Station Ass'n. vs. *Shell Pet. Corp.*, 28 F. Supp. 386.

II.

The Federal District Court below had no original jurisdiction in the case, since here petitioner sought to modify or affect the judgment of a state court.

Petitioners urge that the Circuit Court erred in concluding that their Bill sought to modify or affect the State Court judgments because, they say, their prayer was only to have successful parties in the State litigation declared constructive trustees by the Federal Court. This argument, in effect, admits that Petitioners' attack was collateral and admits also that for the Federal District Court to grant *any* relief, it would have to re-open and re-decide issues involved and decided in the State Court litigation. The point was squarely decided against Petitioners by the Circuit Court in this cause. In addition to the authority cited in the opinion, we refer this Honorable Court to the case of *Fagin* vs. *Quinn*, 24 Fed. (2d) 42 (certiorari denied, 277 U. S. 606). That case, like this, arose from the Eastern District of Texas, was an attack on an earlier State Court judgment, and, like the case at bar, prayed that Appellees be charged as constructive trustees. The Circuit Court there said that, regardless of the fact that slightly different relief was prayed for, the issues were the same as in the State Court litigation and *"could not again be brought in question by an original Bill in a Federal Court."*

III.

Allegations of Petitioners' bill below affirmatively showed due process and it was therefore correctly dismissed, because:

A. Corrective remedies provided by the State were not invoked by Petitioners. This statement refers to the fact that Petitioners never gave the State Courts a chance to pass on their allegations of fraud or denial of due process, although they say that the alleged fraud and denial of due process were known all the time and, although they do not deny that the question could have been raised in assignments of error in the trial Court and motion for rehearing in the Court of Civil Appeals and in the Supreme Court.

Ex parte Meeks, (D. C. Ky.), 20 F. (2d) 543;

Mooney vs. *Holohan*, 294 U. S. 103.

B. Reduced to its essence, Petitioners' chief complaint is that the State Appellate Courts changed the law in certain respects. The cases and authorities, however, are clear that such an act, even if true, involved no denial of due process.

Worchester County Trust Co. vs. *Riley*, 302 U. S. 292;

Howard vs. *Commonwealth of Ky.*, 200 U. S. 164;

American Ry. Express Co. vs. *Ky.*, 273 U. S. 267;

Central Land Co. of W. Va. vs. *Laidley*, 159 U. S. 103.

IV.

Petitioners' Bill was properly dismissed because it was a collateral attack on State Court proceedings theretofore had.

No extrinsic fraud being alleged, the Bill was properly dismissed, since equity does not relieve against intrinsic fraud.

Angle vs. *Shinholt*, 90 F. (2d) 294;

Phillips Pet. Co. vs. *Jenkins*, 91 F. (2d) 183;

Moffett vs. *Robbins*, 81 F. (2d) 431.

V.

As held by the Circuit Court in this cause, petitioners' remedy was by certiorari from the Supreme Court of Texas, and not by original bill in the Federal District Court, which bill, therefore, was properly dismissed.

28 *U. S. C. A., Sections* 41 and 344;

Tidal Oil Co. vs. *Flangan*, 263 U. S. 444;

Frazier Company vs. *Long Beach, etc.*, 77 F. (2d) 764;

Rooker vs. *Fidelity Trust Co.*, 263 U. S. 413;

Fryberger vs. *Parker*, 28 F. (2d) 493.

CONCLUSION

For the reasons outlined above, we therefore respectfully urge this Court to dismiss Petition for Writ of Certiorari filed herein.

Respectfully submitted,

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